## STATE OF MICHIGAN

# COURT OF APPEALS

KERI R. BARRETT and RYAN L. GARDNER,

Plaintiffs/Counter-Defendants-Appellees,

No. 264122

LASCO FORD, INC.,

Genesee Circuit Court
LC No. 03-077617-CP

Defendant/Cross-Defendant-Appellant,

and

v

LONG BEACH ACCEPTANCE CORP.,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellee.

KERI R. BARRETT and RYAN L. GARDNER,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

V

Defendant/Cross-Defendant-

LASCO FORD, INC.,

Appellant/Cross-Appellee,

and

LONG BEACH ACCEPTANCE CORP.,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Cross-Appellee.

No. 264929 Genesee Circuit Court

LC No. 03-077617-CP

UNPUBLISHED March 1, 2007

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

In **Docket No. 264122**, defendant/cross-defendant-appellant, Lasco Ford, Inc. ("Lasco"), appeals as of right a March 28, 2005 order denying its motion for summary disposition and granting summary disposition in favor of plaintiffs/counter-defendants-appellees, Keri R. Barrett and Ryan L. Gardner, in this breach of warranty action. In **Docket No. 264929**, Lasco appeals, and plaintiffs cross-appeal, an August 24, 2005 order entering judgment in favor of plaintiffs and awarding plaintiffs attorney fees and costs. In both appeals, we affirm in part, reverse in part and remand this matter to the trial court for further proceedings.

#### BASIC FACTS AND PROCEEDINGS BELOW

The pertinent facts are as follows. Plaintiffs purchased a used 1999 Ford pickup truck from Lasco on May 23, 2003. Lasco sold the truck to plaintiffs with an express three month/3,000 mile limited bumper to bumper warranty, pursuant to which Lasco was to "pay 25% of the labor and 25% of the parts for covered systems that fail during the warranty period." As a condition of their financing, plaintiffs also purchased an extended service contract from Ultimate Warranty Corporation, which is referred to as a "Platinum Plus" warranty.

A few days after plaintiffs purchased the truck, it began to emit black smoke, it was not accelerating on the highway and it was "backfiring." Plaintiffs became concerned about the truck's operability and reliability. They took the truck to Lasco, who advised them that the exhaust manifold intake bolts were broken, that the truck needed new right and left exhaust manifolds, an EGR tube, and exhaust gaskets, studs and nuts, and that these repairs would cost plaintiffs more than \$1,100. Lasco refused to repair the truck at no cost to plaintiffs, but according to Matt Lasco, offered to "cover 25 percent of parts and 25 percent of labor" pursuant to the limited warranty.

On June 25, 2003, plaintiffs' attorney sent Lasco a letter revoking acceptance of the truck. Plaintiffs did not pursue coverage under the Platinum Plus warranty, believing Lasco to be fully responsible for the repairs, although Barrett conceded at her deposition that Lasco's limited "bumper to bumper" warranty covered 25 percent of labor costs and 25 percent of the costs for parts. Lasco's salesperson contacted plaintiffs to advise them that Lasco would repair the exhaust bolts at no cost to them. However, plaintiffs refused Lasco's offer. Thereafter, plaintiffs commenced the instant action. Following motions for summary disposition, the trial court entered judgment in favor of plaintiffs and Lasco appealed.

### **ANALYSIS**

Lasco and plaintiffs each challenge the trial court's order regarding the parties' respective motions for summary disposition. This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v* 

Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999). Where, as here, it is clear that the trial court looked beyond the pleadings, this Court will treat the motion as having been granted pursuant to MCR 2.116(C)(10). Kefgen v Davidson, 241 Mich App 611, 616; 617 NW2d 351 (2000). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." Maiden, supra at 120. This Court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Id. If the proffered evidence fails to create a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. Id. "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

T.

Lasco first asserts that the trial court erred in by granting summary disposition in plaintiffs' favor on their "revocation of acceptance claim." We agree.

### MCL 440.2608 provides that:

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
- (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
- (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of the discovery before acceptance or by the seller's assurances.

"For the purposes of revocation under MCL 440.2608, nonconformity is a failure of the goods sold to conform to legitimate expectations arising from the contract." *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 82; 719 NW2d 890 (2006). Plainly, a buyer is not entitled to relief unless the nonconformity of the goods substantially impairs the value of those goods to the buyer. See MCL 440.2608(1). A buyer must revoke acceptance of a nonconforming good within a reasonable amount of time after the discovery of the nonconformity. MCL 440.2608(2).

The trial court determined that plaintiffs established the requisite subjective "substantial impairment" under MCR 440.2608, to warrant judgment in their favor as a matter of law on their revocation of acceptance claim. Specifically, the trial court reasoned that Lasco failed to fulfill its duty to repair the truck. However, we find that there is a genuine issue of material fact regarding whether plaintiffs satisfy MCL 440.2608(1)(a). It is unclear based on the record before this Court whether the amounts quoted by Lasco for the repairs reflect total charges for the repairs or 75 percent (i.e., Lasco would pay 25 percent) of the charges for those repairs. It is also unclear whether the repairs set forth in the repair order were intended to address all of the mechanical difficulties with the truck. Contrary to the trial court's findings, Lasco did not have a duty under the limited warranty to repair the vehicle for free. Accordingly, there is a genuine issue of material fact with regard to whether it was reasonable for plaintiffs to assume that Lasco

would repair the truck at no cost to them, as well as to whether Lasco offered to perform its obligations under the warranty. Thus, the trial court erred in granting summary disposition in plaintiffs' favor regarding this claim. MCR 2.116(C)(10).

II.

Lasco next argues that the trial court erred in granting summary in plaintiffs' favor with regard to plaintiffs' claim that Lasco violated the Motor Vehicle Service Repair Act ("MVSRA"), MCL 257.1301 *et seq*, by refusing to repair the vehicle at no cost. We agree.

The MVSRA prohibits persons subject to it from engaging or attempting to engage "in a method, act or practice which is unfair or deceptive", MCL 257.1307, and it imposes liability on any facility that violates the act or who "engages in an unfair or deceptive method, act, or practice." MCL 257.1336. Thus, to establish a claim under the MVSRA, plaintiffs must establish that Lasco engaged in some unfair or deceptive act with respect to the repair, or refusal to repair, the truck.

The trial court concluded that plaintiffs established that Lasco "failed to properly repair the vehicle in a professional workman-like manner, that it failed to perform promised repairs within a reasonable period of time and refused to repair the vehicle after the defects and poor workmanship were brought to [its] attention." The trial court also noted that plaintiffs notified Lasco of their revocation of acceptance of the vehicle before Lasco offered to repair the truck free of charge and that Lasco's offer to repair the vehicle "was for one specific repair, not the total repairs required."

As discussed, it is unclear from the record whether Lasco offered to make the repairs it was obligated to make under the limited warranty that came with the truck. Similarly, the trial court's ruling that plaintiffs had effectuated revocation by the time Lasco offered to completely repair the truck at no cost to plaintiffs and that Lasco's offer to repair the vehicle "was for one specific repair, not the total repairs required" erroneously presumes that Lasco was required to repair the vehicle without cost to plaintiffs. The trial court also erred in ruling that plaintiffs established that more repairs were required than those offered to be performed by Lasco. There is no evidence in the record conclusively demonstrating this fact. Accordingly, there are genuine issues of material fact with regard to whether Lasco is liable under MCL 257.1336. Consequently, the trial court erred by granting summary disposition in plaintiffs' favor regarding plaintiffs' claims under the MVSRA.

III.

Lasco also argues that the trial court erred by granting summary disposition in plaintiffs' favor regarding the "implied warranty" claim set forth in Count II of plaintiffs' complaint. In so ruling, the trial court observed that MCL 440.2316(2) permits conspicuous disclaimers of implied warranties, but concluded that Lasco failed to effectuate conspicuous disclaimers. The trial court explained:

There was no indication given to the seller that this was an "as is" purchase or that the implied warranty is waived upon [p]laintiff[s] taking possession of the vehicle. It is vivid from the buyer's guide that the seller gave no indication to the buyer that it was renouncing its obligations under state law for implied warranties. Instead, the seller emphasized that the buyer may have more rights under state law because of implied warranties. Lasco is prohibited from now disclaiming or modifying any implied warranty. Lasco's failure to honor the implied warranties violated the state warranty law as stated in the Uniform Commercial Code.

Lasco does not challenge the trial court's determination that it breached the implied warranty of merchantability. Rather, Lasco argues that the trial court erred because Lasco properly disclaimed any and all implied warranties as a matter of law. We disagree.

Every contract for the sale of goods carries an implied warranty of merchantability unless such warranty is excluded or modified. MCL 440.2314(1). Such a contract may also carry an implied warranty of fitness for a particular purpose under MCL 440.2315, which may also be excluded or modified. MCL 440.2316 provides, in part:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

### (3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . ..

### Further, MCL 440.1201(10) provides:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: non-negotiable bill of lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

Lasco contends that its disclaimers of implied warranties contained in the sales contract and the bill of sale for the truck were sufficiently conspicuous under MCL 440.2316(2) to disclaim any and all implied warranties as a matter of law.

The sales contract expressly states in ¶ 11 that "THE DEALER HEREBY DISCLAIMS TO THE EXTENT PERMITTED UNDER APPLICABLE STATE LAW, ALL WARRANTIES EXPRESS OR IMPLIED INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE." However, the same sales contract contains a provision in ¶ 12 that provides:

UNLESS A SEPARATE WRITTEN DOCUMENT SHOWING THE TERMS OF ANY DEALER WARRANTY OR SERVICE CONTRACT IS FURNISHED BY THE DEALER TO THE PURCHASER, THIS VEHICLE IS SOLD "AS IS" WITHOUT ANY WARRANTY EITHER EXPRESS OR IMPLIED. THE PURCHASER WILL BEAR THE ENTIRE EXPENSE OF REPAIR OR CORRECTING ANY DEFECTS THAT PRESENTLY EXIST OR THAT MAY OCCUR IN THE USED VEHICLE.

This language appears to provide an exception to the disclaimer contained in ¶ 11. According to ¶ 12, the vehicle is sold "'as is' without any warranty either express or implied" "unless a separate written document showing the terms of any dealer warranty or service contract is furnished by dealer." Where a written document showing the terms of the dealer warranty are provided one can reasonably interpret ¶ 12 to mean that the vehicle is not sold "as is." Plaintiffs were provided with a written document, the Buyer's Guide, which expressly provided that the truck was being sold with a limited warranty and specifically stated, "[u]nder state law, 'implied warranties may give you even more rights." The Buyer's Guide also advised plaintiffs "a service contract is available at an extra charge on this vehicle. Ask for details as to coverage, deductible, price, and exclusions. If you buy a service contract within 90 days of the time of sale, state law 'implied warranties' may give you additional rights." Plaintiffs purchased the Platinum Plus warranty when they purchased the vehicle, and thus, the Buyer's Guide clearly suggests that they may have additional rights pursuant to state law implied warranties.

The Buyer's Guide unequivocally indicates that the truck was not sold "as is" and twice references additional rights that may be available to the buyer under "state law implied warranties." Under these circumstances, Lasco's disclaimer is confusing and inherently contradictory and does not satisfy MCL 440.2316 because it does not contain language "which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." MCL 440.2316(3)(a). Therefore, the trial did not err in concluding that Lasco's disclaimer of implied warranties was ineffective as a matter of law.

IV.

Plaintiffs argue on cross-appeal that the trial erred by granting summary disposition in Lasco's favor with respect to plaintiffs' Magnuson-Moss Warranty Act ("MMWA") claim. We agree.

The MMWA applies only to the sale of a consumer product, defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes." 15 USC 2301(1). Here, the trial court concluded that the truck

was not a consumer product for purposes of the MMWA because plaintiffs purchased it primarily for Gardner to use for work purposes. However, 16 CFR 700.1 provides that:

(a) The [MMWA] applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes. This definition includes property which is intended to be attached to or installed in any real property without regard to whether it is so attached or installed. This means that a product is a "consumer product" if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by any individual buyer is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage. [Emphasis added.]

In today's usage, pickup trucks are commonly purchased "for personal, family, or household purposes." Pursuant to 16 CFR 700.1 then, the truck is a "consumer product" under the MMWA, irrespective of the use to which it was to be put by these individual plaintiffs. Accordingly, the trial court erred by dismissing plaintiffs' MMWA claim based on its ruling that the truck was not a "consumer product."

V.

Plaintiffs further argue that the trial court erred in granting Lasco summary disposition regarding plaintiffs' breach of implied and express warranty claims.

As discussed above, the trial court correctly granted summary disposition in plaintiffs' favor regarding Lasco's failure to sufficiently disclaim implied warranties. Therefore, plaintiffs' argument that the trial court failed to do so is without merit. However, the trial court did grant Lasco summary disposition with respect to plaintiffs' "express warranty" claim, holding that there was no evidence that Lasco breached its express warranty because it offered to fix the truck at no cost.

Plaintiffs contend that Lasco provided a "bumper to bumper" warranty, which is an express warranty under MCL 440.2313 that cannot be disclaimed. MCL 440.2313 provides:

- (1) Express warranties by the seller are created as follows:
- (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) A description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

- (c) A sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he or she have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty, except as provided in the art multiples sales act and Act No. 121 of the Public Acts of 1970, being section 442.321 to 442.325 of the Michigan Compiled Laws.

Here, the "bumper to bumper" warranty provides that "[t]he dealer will pay 25% of the labor and 25% of the parts for the covered systems that fail during the warranty period." Although this limited warranty appears to constitute an express warranty under MCL 440.2313, the parties have not presented any evidence of terms or conditions other than this general statement in the Buyer's Guide regarding its coverage and scope. Further, as discussed *supra*, there remains an issue of material fact with respect to whether Lasco breached its warranty. Based on this record, the trial court erred by ruling that there was no genuine issue of material fact regarding whether Lasco performed its obligations under the warranty. The trial court erred in dismissing plaintiffs' express warranty claim as a matter of law. MCR 2.116(C)(10).

#### VI.

Finally, plaintiffs argue that they are entitled to recover reasonable attorney fees incurred on appeal of this matter pursuant to both the MMWA and MVSRA. However, as discussed above, plaintiffs were not entitled to summary disposition in their favor regarding either their MMWA claims or their MVSRA claims. Thus, plaintiffs have failed to demonstrate that they are entitled to fees or costs for fees for services rendered in these consolidated appeals.

In **Docket No. 264122**, we affirm in part, reverse in part and remand this matter for further proceedings consistent herewith. In **Docket No. 264929**, we affirm in part, reverse in part and remand this matter for further proceedings consistent herewith. We do not retain jurisdiction.

/s/ Pat M. Donofrio /s/ Richard A. Bandstra /s/ Brian K. Zahra